In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

THE INTERNATIONAL UNION OF UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., ETC., APPELLANTS

v.

GERALD K. O'BRIEN, WAYNE COUNTY PROSECUTING ATTORNEY, AND STEPHEN J. ROTH, ATTORNEY GENERAL OF THE STATE OF MICHIGAN

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

The National Labor Relations Board believes that the constitutional question presented by this appeal, namely, whether the Michigan strike limitation statute can be applied to employees engaged

in interstate industries compatibly with the National Labor Relations Act, is of substantial importance in the administration of the National Act and warrants review by this Court. The decision below purports to follow the decision of this Court in *International Union, U.A.W.A., A.F. of L., Local 232* v. *Wisconsin Employment Relations Board*, 336 U.S. 245. The Board is of the opinion that the holding in that case does not and should not control the question here in issue.

1. *The Michigan Act deals with a subject matter completely preempted by Congress in the National Act.* In the *U.A.W.* case this Court held that the states were free to enjoin the intermittent or recurrent work stoppages there involved because Congress had neither protected such activity under Section 7 nor had it outlawed or authorized the Board "to prohibit or to supervise the activity . . . nor to entertain any proceeding concerning it" (336 U. S. 245, 263). In the *U.A.W.* case there was no evidence that Congress had considered the question whether the "coercive tactics" utilized in that case should or should not be protected by Federal law, and, in the Court's view, the National Board was powerless to condemn such practices "because it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board" (336 U S. 245, 263).

The union conduct condemned by the Michigan statute, here in issue, however, is not thus removed

from the field covered by the National Act. In the first place the legislative history of the amended Act shows that Congress expressly considered whether or not strikes engaged in by a minority of the employees in a bargaining unit without approval of the majority should continue to enjoy the protection of Section 7. The original House Bill, H.R. 3020, 80th Cong. 1st Sess., made if an unfair labor practice for a labor organization to call a strike without authorization from a majority of the employees voting by secret ballot (Section 8 (*c*) (8)). This House provision, virtually the parallel of the Michigan law, was rejected by Congress. Congress did not leave to the individual states power to override its judgment that such a limitation upon strikes was undesirable. Unlike the provisions dealing with the union shop, Sections 8 (a) (3), 8 (b) (2), 14 (b), Congress left no room for the exertion of state power in this field. Since Section 7 had previously been construed as protecting strikes for a legitimate objective engaged in by a minority of the employees in a bargaining unit without the approval of a majority, rejection of the House proposal to remove such strikes from the area of protected concerted activities must be taken as signifying Congressional approval of that construction.

Secondly, Congress in the amended Act adopted provisions which in certain circumstances limit the right to strike during specific periods, and until certain notices have been given. Section 8(d),

discussed more fully below (p. 10, *infra*), applies such limitation to strikes arising out of attempts to modify or terminate collective bargaining contracts. Congress subjects strikes in violation of this provision to the regulatory power of the Board. The action of a labor organization in calling a strike without giving the notices required by Section 8(d), or during the 60-day waiting period prescribed therein, is an unfair labor practice under Section 8 (b) (3) of the Act, as amended. In Sections 206-210 of the Labor Management Relations Act, Congress further provided for the issuance of temporary injunctions against strikes involving the national health, safety and welfare, and, in that connection provided for the conduct of elections by the National Board among the employees involved. We think it clear that by enacting these detailed provisions dealing with waiting periods in strike situations subject to the National Act Congress intended to and did occupy that field and left no room for the imposition by the states of similar or additional restrictions. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 775-776.

The instant case involves a strike arising out of an attempt to modify the terms of an existing agreement, and was therefore subject to the notice and waiting requirements of Section 8 (d) of the National Act (R. 9). The union complied with these requirements (R. 10-11, 19, 27), and the strike

thereby qualified for the protection accorded by Section 7. The waiting period imposed by the Michigan law operates in the very field covered by the National Act, and penalizes activities which enjoy Federal sanction. The Michigan law thus stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 773.

2. *In practical administration the Michigan Act conflicts with and obstructs effectuation of Federal policy in the field of collective bargaining.* By decision and certification of the National Board the Union represents in a single bargaining unit employees of the Chrysler Corporation employed in plants located in the states of Indiana and California as well as the State of Michigan. *Matter of Chrysler Corp.*, 13 N. L. R. B. 1303, 17 N. L. R. B. 737; (R. 108, Ex. 4, p. 1). The successive collective bargaining agreements between the Union and the Chrysler Corporation apply to all employees in this bargaining unit (*ibid*). The National Act contemplates that to effectuate its policies all employees in a bargaining unit found appropriate by the Board shall be free to act together in collective bargaining and related activities. The one exception relates to union security arrangements where Congress specifically provided that the policy of the National Act was to depend upon the prohibitory legislation of individual states (Section 14 (b)).

The elections provided for by the Michigan law are limited by the statute to employees in a bargaining unit defined by the state board, in this case a unit necessarily narrower than that certified by the National Board. The Michigan statute, by imposing waiting period limitations upon employees in the Company's Michigan plants which are not imposed upon employees in the Company's Indiana and California plants, *pro tanto* prevents the employees in the bargaining unit from taking uniform action in support of lawful bargaining demands, and thereby impairs Federal policy in the field of collective bargaining.

3. *The Michigan statute, as applied to employees subject to the National Act, invades rights protected by the National Act.* In the *U.A.W.* case, 336 U.S. 245, 264-265, this Court held that "recurrent or intermittent unannounced stoppage of work to win unstated ends was * * * [not] legalized and approved" by the National Act, and concluded for this reason that the states were not precluded by the National Act from enjoining such "coercive tactics." The Court pointed out that the affirmative protection accorded by Section 7 of the National Act to "concerted activities for the purpose of collective bargaining" does not extend to "every type of concerted activity" (336 U. S. at p. 257), or to "every kind of strike" (336 U. S. at p. 260). In determining whether the states were empowered to enjoin the particular union conduct involved in

that case the Court looked to relevant Board and court decisions construing Section 7 of the National Act (336 U. S. at pp. 255-257). It concluded that the state prohibition could stand because neither the "bare language of Section 7," nor "the settled interpretation of the Act by the Board," nor applicable decisions of the Supreme Court and of various Courts of Appeals "immunize the conduct forbidden by the judgment below" (336 U. S. at pp. 255, 257).

We do not believe the Court decided in that case that Sections 7 and 13 of the National Act contain no protection for *any* type of strike or work stoppage in aid of collective bargaining, and that the states are free to enjoin strikes or work stoppages which are thus protected. On the contrary, the language of the opinion, which denies to Section 7 the effect of protecting "*every* type of concerted activity," "*every* kind of strike," or "*all* concerted activities" (336 U. S. at p. 257, 260, italics supplied), implies recognition that some forms of strikes and work stoppages in aid of collective bargaining are affirmatively protected by Section 7 against state interference. Resort to Board and court decisions which distinguish between types of strikes and other concerted activities which are protected by Section 7 from those which are not, would have been superfluous if the Court meant to hold that Section 7 did not have the effect of precluding state interference with the exercise by employees of the right to en-

gage, at least, in traditional forms of concerted activity in aid of collective bargaining. Consequently, it cannot be said that the *U.A.W.* case authorizes state interference with the type of concerted activities involved in this case.

Section 7 affirmatively grants to employees the right to engage in "concerted activities for the purpose of collective bargaining." That grant clearly comprehends the right of employees to engage in the traditional type of strike, such as that here involved, in support of lawful collective bargaining demands. The strike is the classic, and historically the most important, form of labor's "concerted activities" for purposes of collective bargaining. Congress regarded the right of employees to strike, *i. e.*, to withhold their labor for the purpose of bringing economic pressure to bear upon employers to secure stated demands, as indispensable to equalization of employee bargaining power and hence to the process of collective bargaining.

The Board and the courts have uniformly held that the right of employees to strike in aid of lawful collective bargaining demands or to secure redress of grievances is affirmatively protected by Sections 7 and 13 of the Act. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-347; *National Labor Relations Board* v. *Fansteel Corp.*, 306 U. S. 240, 256; *National Labor Relations Board* v. *Kalamazoo Stationery Co.*, 160 F. 2d 465 (C.A. 6), certiorari denied, 332 U. S. 762; *Matter of American Manufacturing Co.*, 5

N. L. R. B. 443, enforced, 106 F. 2d 61 (C.A. 2), affirmed, 309 U. S. 629. The Board, as well as both courts of appeals which have considered the matter, has likewise held that Section 7 protects the right of a minority of the employees in a bargaining unit to strike in aid of legitimate demands, just as it protects the right of the majority. *Kalamazoo Stationery* case, *supra; National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199, 205 (C. A. 4). To deprive employees altogether of the right to strike, as does the Michigan statute, unless they first secure the approval of a majority of the employees in a bargaining unit, is to deny to employees a right clearly protected by the National Act. Cf. *Hill* v. *Florida*, 325 U. S. 538.

Moreover, the Michigan statute obstructs and impedes the exercise of the federally protected right to strike even when a strike is approved and participated in by a majority, or, indeed, by all of the employees in a bargaining unit. Under Section 9 of the state act no strike may lawfully take place within a 10-day period following the giving of notice, by the employees or their representative, to the State Mediation Board. Nor may a strike lawfully occur until the State Board conducts an election. Thus even if the employees unanimously favor a strike during this period they are precluded by the Michigan law from engaging therein. Speaking of the National Act prior to amendment, the Court of Appeals for the Sixth Circuit pointed out

in *National Labor Relations Board v. Kalamazoo Stationery Co.*, 160 F. 2d 465, 471, certiorari denied, 332 U. S. 762, that "The Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period" as a condition precedent to protection of the right to strike. It concluded that the Michigan Act there involved could not constitutionally be applied in industries subject to the National Act.

In the amended Act Congress narrowed the area of protection accorded to strike activities by requiring in Section 8 (d) that a party desiring to terminate or modify a collective bargaining agreement must notify the other party 60 days prior to the time it is proposed to make such termination and modification, must notify the federal and state conciliation agencies 30 days prior to such time, and must continue in effect, without strike or lock-out, the terms of the existing agreement for 60 days or until the contract expires. The same section provides that any employee who engages in a strike during such period shall lose his status as an employee of the employer involved. But it should be noted that the limitation contained in the National Act as amended, applies only "where there is in effect a collective-bargaining contract." The limitation embodied in the Michigan Act, however, contains no such restriction, and unlike Section 8 (d), applies to strikes which do not involve modification or termination of existing agreements. As to such strikes it remains true under the amended as under

the original act that the "Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period," and, hence, this Michigan Act, as the court held of its predecessor in the *Kalamazoo Stationery* case, "impairs, qualifies [and] . . . subtracts from" rights guaranteed by the National Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the constitutional question herein presented is substantial; that the judgment below conflicts with controlling decisions of this Court; and that this Court should therefore entertain the appeal. If this Court should decide to note probable jurisdiction, the Board respectfully prays leave to participate in oral argument on the merits of the constitutional issue.

Respectfully submitted,

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